No. 2620

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SAN FRANCISCO BREWERIES, LTD. (a corporation),

Plaintiff in Error,

vs.

SYLVIA A. BRAINARD,

Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

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Of Counsel.

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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I.

NATURE OF THE CASE.

This is an action brought by the defendant in error, as plaintiff, against the plaintiff in error, as defendant, in the Superior Court of the City and County of San Francisco, State of California, and thereafter, by proper proceedings in that behalf taken, transferred to the District Court of the United States, Northern District of California, Second Division, to recover from the said defendant the sum of $25,000.00 damages for personal injuries alleged to have been received by her by and

through the carelessness and negligence of said defendant.

The case was tried before the Court sitting with a jury, on the complaint of the plaintiff in said cause and the answer thereto of the defendant, and, after the conclusion of said trial, the jury rendered a verdict in favor of the plaintiff and against the defendant for the sum of $8000.00, in accordance with which, judgment was made and entered in said cause in favor of the plaintiff therein and against the defendant, on the 15th day of April, 1915, for the sum of $8000.00, together with $52.80 costs.

Thereafter, and upon due, proper and legal proceedings in that behalf had and taken, the defendant in said cause prosecuted a writ of error to this Court for the purpose of having said judgment vacated, set aside and reversed, basing its prayer for that relief upon the grounds:

1. That the evidence introduced on the part of the plaintiff at the trial of said cause, and in support of the allegations of her complaint, was and is insufficient to justify the verdict aforesaid, and that the Court erred in refusing to grant defendant's motion for a nonsuit, as appears by Exception No. 1 in the Transcript of record on file herein, greatly to the injury and damage of said defendant.

2. That the evidence introduced on the part of both plaintiff and defendant at the trial of said cause, was and is insufficient to justify the verdict

aforesaid, and that the Court erred in refusing to instruct the jury at the conclusion of said trial, as requested by the defendant, to render a verdict in favor of the defendant and against the plaintiff in said cause, as appears by Exception No. 2 in the Transcript of record on file herein, greatly to the injury and damage of the rights of said defendant.

3. That the Court erred in giving to the jury the certain instruction excepted to by the defendant, as appears by Exception No. 3 in the Transcript of record on file herein, greatly to the injury and damage of the rights of said defendant.

4. That the Court erred in refusing to give to the jury the certain instruction requested by the defendant, as appears by Exception No. 4 in the Transcript of record on file herein, greatly to the injury and damage of the rights of said defendant.

5. That the Court erred in causing judgment to be entered in said cause on the verdict of the jury rendered therein, greatly to the injury and damage of the rights of said defendant.

All as shown by the five different Assignments of Error set forth and contained in theAssignment of Errors appearing on pages 129 and 130 of the Transcript of record on file herein, and by the Bill of Exceptions incorporated in said record on pages 33 to 138, inclusive, of said record.

II.

ASSIGNMENTS OF ERROR.

As to Assignment of Error No. 1.

This is directed to the refusal of the Court to grant the defendant's motion for a nonsuit. After the testimony on the part of the plaintiff, and in support of her complaint, had been all introduced, the defendant then made a motion for a nonsuit in the words and figures following, to wit:

"We desire to make a motion for a nonsuit, on the ground that the only thing shown by the testimony is that a team of horses, which had been rented to the defendant, ran away and injured the plaintiff. It is not shown that, at the time of running away and the injury to the plaintiff, said horses were in the charge or under the control of the defendant or any of its agents, servants or employees. There has not been shown any incompetency on the part of anybody connected with the defendant, in any way, shape or form. The sole and only thing that has been shown is, as I stated first, that a team of horses, which had been rented to the defendant in the case, ran away; and, secondly, that the plaintiff in the action was injured. We contend that there is no showing of any kind or character even tending to establish the allegation in the complaint of incompetency on the part of anyone connected with the defendant, or tend-

ing to show any negligence of any kind or character upon the part of the defendant."

Which motion the Court denied. To the ruling of the Court in so doing defendant excepted, and the same is designated as Exception No. 1.

(Page 61 of the Transcript of record.)

As to Assignment of Error No. 2.

This is directed to the refusal of the Court to instruct the jury at the conclusion of the trial to return a verdict in favor of the defendant and against the plaintiff. To such ruling the defendant excepted, and the same is designated as Exception No. 2.

(See page 122 of Transcript of Record.)

As to Assignment of Error No. 3.

This is directed to an instruction given to the jury by the Court over the objection of the defendant as follows:

> "If you believe from the evidence, therefore, that the defendant had control of the team of horses, and that, while in such control, left the team unfastened and unattended upon its premises, and with the gate or door leading to the street open, and that, because of being so left unsecured or unattended, the team escaped from the premises and ran away upon the street, and as a result the plaintiff was injured, then that is a prima facie case of negligence upon the part of the defendant."

To the giving of which the defendant excepted, and the same is designated as Exception No. 3.

(See page 124 of Transcript of record.)

As to Assignment of Error No. 4.

This is directed to the refusal of the Court to give to the jury an instruction requested by the defendant in the words and figures following, to wit:

> "You are hereby instructed that, at the time of the accident in this action referred to, there was in existence in the City of Oakland an ordinance entitled 'Ordinance No. 607, N. S., Regulating Traffic and Care of Vehicles and Horses on and over the Public Highways in the City of Oakland, California', and that in and by Section No. 24 thereof it is provided as follows: 'No horse shall be left unattended in any highway in the City of Oakland unless securely hitched by a rope, strap or chain attached to its neck or bridle and to a post or other suitable fastening at the curb, or by a rope, strap or chain attached to its bridle and to a suitable weight of not less than twenty pounds; or, in case of one or two horses being hitched to a wagon fitted with a suitable brake, the horses may be backed, the brake set, and the lines or reins so fastened that the wagon cannot be drawn forward by the horse or horses, except by means of the lines or reins.' And, if you believe from all the evidence in the case that, at the time the horses in this action referred to ran away, they were fastened as in and by said ordinance required, then and in such event the defendant cannot be considered as guilty of negligence in the matter of fastening said horses."

To which refusal defendant excepted, and the same is designated as Exception No. 4.

(See page 125 of Transcript of record.)

As to Assignment of Error No. 5.

This is directed to the action of the Court in authorizing judgment to be entered on the verdict rendered by the jury, and, in view of all the facts and the law hereinbefore set forth and stated, the plaintiff in error respectfully submits that the judgment should be reversed therefor.

III.

ARGUMENT AND AUTHORITIES.

As to the First Assignment of Error.

Refusal of Court to grant defendant's motion for a nonsuit (see page 61 of Transcript).

In support of the contention of the plaintiff in error that this ruling of the Court was erroneous, we would respectfully call the attention of your Honors to the only testimony offered on the part of the plaintiff in support of her allegation that her injuries were caused by and through the carelessness and negligence of the defendant, and to the fact that there is not one word in that testimony that even tends to show any carelessness or negligence or incompetency of any kind or character on the part of the defendant or of any of its agents, servants or employees.

Mr. Thun was called as a witness on behalf of the plaintiff and, on direct examination, testified as follows:

"My name is Charles Thun; and on the 29th day of May, 1914, I run a kind of service stable at 207 Washington Street, close to Second, in the City of Oakland, and on that day I rented a team to the Wieland Brewery Company. I remember that day; the day before that they called me up and asked me if I had a team I could rent. I told them I had one, that it was a free team and I did not like to let everybody have it. They said they would take good care of it. By free team I mean a free team in travelling. I suppose it was the manager that called me up; I do not know his name; I know him when I see him; I took the team over there the next morning at seven o'clock and saw the man, I suppose it was, that was taking care of the barn. I told him about it; I do not know his name; he was the man I saw there taking care of the barn. I told him the team had done nothing for a couple of days, to be a little careful with them, because a team that does not do anything for a couple of days are feeling quite full of life and a person cannot trust them any. He said he would look after them, and I left the team there. They told me to telephone them and find out when they wanted the team the next day. I called them up on the phone about half past three, and they told me to come over and get them about half past five, and I went over to get them at that time. I rang up about half past three, as near as I can remember; I got there about half past five, and the team was standing in the yard hooked to the wagon. By the word yard I mean kind of a shed or floor boarded up from the outside. There is a door where they drive in and out there."

(Bottom of page 33, all of page 34, and top of page 35, Transcript of record.)

There were then introduced in evidence on the part of the plaintiff three pictures of the premises

of the defendant, which were marked respectively Plaintiff's Exhibits 1, 2 and 3, which pictures were admitted to be correct representations of said premises generally, and one picture of the corner of Broadway and Twentieth Street, where the accident happened to plaintiff, marked as Plaintiff's Exhibit 4. And, before proceeding with the examination of Mr. Thun, and for the purpose of enabling the Court to become somewhat familiar with the premises of the defendant, which are referred to in his testimony, we will give a brief explanation of the exhibits referred to.

Plaintiff's Exhibit No. 1.

Is a picture taken from directly in front of the premises of the defendant, located on the west side of Broadway, between Nineteenth and Twentieth Streets, and shows the front view of the building in which was located the office of the defendant, and the yard adjoining the same on the Nineteenth Street side thereof, the portion of said exhibit occupying the left one-half of said picture showing the entrance to said yard with the door thereto open, and the portion of said exhibit occupying the right one-half of said picture showing the entrance to the office of said building with the number 1931 on the door thereof. Looking back through the open doorway into the yard will be seen a team of horses standing about in the same position that the horses used by defendant were standing when they ran away, and still back of them will be seen

the open doorway to the stable at the rear end of the premises of defendant.

Plaintiff's Exhibit No. 2.

Is a picture taken apparently from a position a short distance to the right, and toward Twentieth Street, of that occupied in the taking of Exhibit No. 1, showing the same entrance to the yard referred to in Exhibit No. 1, at the right of the picture, while to the left of said picture is shown the entrance to said yard nearest Nineteenth Street. In this picture can also be seen through the open doorway to the yard, a wagon standing back in said yard, about in the same position occupied by the wagon of the defendant at the time that the horses in the complaint referred to ran away; and still back of that the same entrance to the stable shown in Exhibit No. 1.

Plaintiff's Exhibit No. 3.

Is the same as Exhibit No. 2, except that the picture is apparently taken from a position a short distance to the left, and toward Nineteenth Street, of that occupied in taking Exhibit No. 1.

NOTE.—When Exhibits Nos. 1 and 3 are placed over each other so that the portion of the letter "R" shown on the extreme right of the sign appearing on said Exhibit No. 2 is placed over the first letter "R" shown in the word "Fredericksburg" in the sign over the office in Exhibit No. 1, a full front view of the premises of the defendant will be

obtained, showing the building in which the office was located, the entrance to the yard immediately adjoining said office on the Nineteenth Street side thereof, and the entrance to said yard nearest Nineteenth Street. In each of these pictures the door out of which the horses ran when they ran away is shown as open, and an "X" is marked over the same.

Plaintiff's Exhibit No. 4.

Is a photograph of the northwest corner of Twentieth Street and Broadway, in the City of Oakland, and shows the place where the plaintiff was run into and injured by the team of horses, in the complaint referred to, that ran away.

All of which, we understand, are among the records before the Court on this hearing, and to the originals of which we hereby refer.

The examination of said witness was then proceeded with, and he testified as follows:

> "When I got there about half past five in the evening, the team was standing there in the yard back a ways from the door in Plaintiff's Exhibit No. 1, over which I have marked an X, about twenty or thirty feet back, I think. While on each of the two pictures shown me, one of the doors is shown as closed, at the time of the accident both doors were open. The horses were headed toward Broadway as they were standing hitched to the wagon.
>
> "Q. By Mr. Moore. When you got there upon that occasion and saw the team standing there, will you state whether or not, whether

they were tied back or hitched back when you first went in?

"A. I never paid no attention to whether they were or not.

"Q. Did you notice, at the time you first went in there, or before the team started off, whether or not the reins were fastened back to the seat?

"A. Well, I came from in back of the wagon and I never noticed whether they were hitched back to the seat or not.

"Q. What did you do when you came in there about half past five that afternoon, what did you do and where did you go?

"A. Well, when I came in there and they says 'There's your team', he said, 'Hold on and we will unhitch them for you', and I started for the office to make a settlement of the day's work, and he started to unhook them and I started in the doorway and they started off.

(Witness continuing.) "When I said, 'They said they would unhitch them for me', I meant one of the attendants. When I brought the horses there in the morning, I did not hitch them to the wagon; I think the driver and the fellow who was taking care of the barn did; I would not say for sure which one it was, any way it was the people who were working for the Brewery; it was the driver who said, 'We will unhitch them'.

"Q. By Mr. Moore. You stepped to the office to settle for the time of the team, didn't you? A. Yes, sir.

"Q. Whereabouts is the office?

"A. It is right close to Broadway, it is right in from Broadway.

"Q. Could you show on one of these pictures here where the location of that office is?

"A. Right here.

"Mr. Moore. For the benefit of the record, the witness calls attention to a small doorway of ordinary size that is shown in the picture and that is marked with the figures 1931, being this doorway right here, gentlemen.

(Witness continuing.) "That is not the doorway I went in; I went in from the back. There is a door into this office off the main floor of the Brewery, and it was by means of that I was approaching the office.

"Q. By Mr. Moore. As you were walking over in the direction of that doorway, what, if anything, did you see the driver do, or where, if anywhere, did you see the driver go?

"A. We both came up to the wagon and I turned in back of the wagon to go into the door and he went on up to the team; that is the last I seen of him until the team started.

"Q. When you were going toward the door, was the driver ahead of you or behind you?

"A. We were walking side by side.

"Q. Will you state whether or not you saw the driver at the front wheel or step of the running board at any time?

"A. No, sir, I could not say that, I did not see it.

"Q. Which side of the wagon were you on at the time the team started?

"A. I had been on the left side; I just stepped on the door-sill when they started.

"Q. And which side of the team was the driver on at that time? A. On the right side.

"Q. By the Court. On the opposite side from where you were? A. Yes, sir.

"Q. Where was the driver next when the team started; where was he; was he on the floor or where?

"A. He had got out as far as the sidewalk; that was the next place I saw him.

"Q. By Mr. Moore. Where was the team at that time?

"A. The team was out on the street.

"Q. Did you see the team start to go out on the street?

"A. Well, it was done so quick I could not see very much of it until they got just out of the door.

"Q. Now, I want to ask you where the reins were at that time and whether the reins were tied back or whether the reins were dragging at the time they got out into the street and you were able to get a good look at them?

"A. When I got a good look at them the accident happened, it had already happened.

"Q. You saw them, didn't you, when they were out on the street and before the accident happened? A. I seen them running, yes.

"Q. Where were the reins then?

"A. Well, I could not swear to just where they were then, because I was too far behind.

"Q. Don't you remember whether they were on the wagon at that time or were dragging?

"A. No, sir; you see I was behind the wagon and I could not see ahead of the wagon.

(Witness continuing.) "It is pretty hard to tell how fast the team were running; they were running very fast, they were at a full gallop. I ran after them, but could not run as fast as they could. When I saw the team running down Broadway toward Twentieth Street the hind wheels of the wagon were turning around.

"Cross-Examination.

"Q. By Mr. MILLER. How far could you see the wagon at the time you looked and saw the wheels turning? A. About 100 feet.

"Q. And the wagon was directly in front of you and was going away, wasn't it?

"A. Yes.

"Q. So you didn't have a side view of it at all?

"A. No, I could see the back part of the wagon.

"Q. Do you remember looking particularly and seeing that those wheels were turning?

"A. Well, I seen the whole wagon.

"Q. You saw the wagon going, but did you look particularly and see those wheels turning?

"A. A person does not have to do that.

"Q. I am asking you, did you look and can you say now that you saw those wheels turning?

"A. I did not particularly just look at the wheels, because I was looking at the wagon.

(Witness continuing.) "I first went down to the Breweries place in the morning; the horses were harnessed up, I harnessed them in my barn and drove them down there; I don't remember whether I went into the entrance next to Twentieth Street or the one nearest Nineteenth Street; when I drove the horses there in the morning, the wagon was standing where they were standing in the evening, it was somewhere around there. When I got there in the evening, the horses were standing at the platform in the yard about twenty or thirty feet back from the street, with their heads facing Broadway or to the front of the building; it was not to Mr. Crow that I delivered the horses in the morning, it was another man; when I delivered them to him I immediately went away. Both Mr. Cooper and Mr. McKinnon were there when I delivered the horses in the morning, but I don't know which one of them took the horses. When I went after the horses in the evening, these two men and Mr. Crow, the driver, were all there; when I went in I asked them if they were through with the team; I did not ask any particular one; three of them were

there. When someone in the Brewery phoned to me about getting the team, they asked me if I had a team to rent, and I said yes, I have. They wanted to know if it was a good team, and I said yes, it was a lively team; I did not tell them that the team was wild, but I said to be careful with them because they have not been doing anything for three days; I think it was Mr. Walker I talked to over the phone; I did not see him when I took the horses over in the morning; I just started into the office to talk to him when I went after the team at night. When I went around there that night to get the horses, I started for the office from in back of the wagon, I did not go into the office, but went back into the shed; I think I went into the entrance nearest Nineteenth Street, clear back, the back end around by the stable, and when I got there I saw the three men, Cooper, McKinnon and Crow, and one of them, pointing up to the front of the place said, 'There's your team, it is ready for you'. After that I stayed around for a moment watching a horse that was being doctored, and then said, 'I guess I'll have to unhitch and then go home', and then started to walk up to the horses and wagon, and Crow went with me and said, 'I'll unhitch them for you'; and we walked toward the wagon. The hind wheels of the wagon were standing right opposite the door into the building, that is, the back door that goes into the shed, and there was room between that door and the wagon to get inside of the door; when the horses started, I don't know where Mr. Crow was, I did not see him; I did not see him get on the wagon, and I didn't see him loosen any lines that were fastened to the seat of the wagon."

(Pages 35 to 46, inclusive, of the Transcript of record.)

The foregoing is all of the evidence offered by plaintiff in support of the following allegations contained in her complaint, to wit:

> "On the 29th day of May, 1914, in the City of Oakland, County of Alameda, State of California, the defendant had under its control and management, and was using in and about the regular course of its business a certain delivery wagon, and a team of two horses by which said delivery wagon was drawn; on said 29th day of May, 1914, the defendant had in its employ a certain unskilful, incompetent and careless servant named Harry Crow, who was employed by the defendant as a driver and who, on said 29th day of May, 1914, in and about the business of the defendant and within the scope of his said employment, was engaged in driving said horses.
>
> "On said 29th day of May, 1914, while said horses and said delivery wagon were under the control and management of the defendant, said Harry Crow so unskillfully, carelessly and negligently conducted himself in and about the driving and management of said horses, which were then and there harnessed to said delivery wagon, that said horses, by reason of the unskillfulness, carelessness and negligence of said Harry Crow, took fright, escaped from his control, and ran away, drawing after them said delivery wagon."

That testimony, we respectfully submit, not only fails to give any support to the allegations of the complaint which are above quoted, but clearly shows:

1. That, at the time the team in question ran away, it had been delivered to, and was under the management and control of, Thun, the owner there-

of, and was not under the management or control of the defendant or of any of its agents, servants or employees. That Thun himself so considered, is established by his testimony to the effect that, when he went to the place of business of the defendant on the afternoon of May 29th, 1914, to get his team after being phoned to by the defendant that said team would be ready for him about 5:30 o'clock P. M., one of the employees of defendant, pointing toward the team, said to him, "There is your team, it is ready for you."

(See bottom of page 43 of Transcript.)

And that he, Thun, after staying around for a moment or so, then said, "I guess I'll have to unhitch and go home".

(See middle of page 44 of Transcript.)

2. That, whether said team, at the time it ran away, was under the management and control of the defendant or under the management and control of Thun, it did not run away because of any negligence or carelessness or unskillfulness or incompetency of the defendant or of any of its agents, servants or employees, for there is not one word in any evidence offered on the part of the plaintiff showing, or even tending to show, that, by reason of any act or omission upon the part of said defendant, or on the part of any of its agents, servants or employees, said team ran away, the sole and only showing made being that said team ran away while on the premises of the defendant; and that such

fact does not, of itself, constitute any evidence whatever of any carelessness or negligence or unskillfulness or incompetency upon the part of the defendant, or of any of its agents, servants or employees, is clearly shown by the following authorities:

Rowe v. Such, 134 Cal. 573.

In this case it is held:

> "In an action by an executrix to recover for the death of the testator caused from being struck by a wagon drawn by a runaway horse, the burden of proof is upon the plaintiff to show negligence of the driver. In the absence of such proof there is no presumption of negligence arising from the fact that the horse ran away; and the burden of proof is not thereby cast upon the owner of the team sued as defendant to explain how or why the runaway occurred; but the defendant is entitled to a nonsuit."

Coller v. Knox, 71 Atl. 539 (Pa.).

In this case it was held:

> "The mere fact of a runaway does not by itself imply negligence, nor would even leaving a team standing in a private lane do so."

O'Brien v. Miller, 22 Atl. 544 (Conn.).

In this case a nonsuit was granted the defendant by reason of the fact that the only showing made by the plaintiff was that he was injured by a horse that was running away. The Court, in passing upon the question, held that the mere fact that a horse was running away raised no presumption of negligence of the driver and quoted with approval

from the decision in Button v. Frink, 51 Conn. 342, as follows:

> "If a horse is running away with his driver, there is nothing in that fact which tends to show negligence in the driver or which tends to show how the horse became unmanageable, any more than a house on fire tends to show the origin of the fire, whether accidental or otherwise; and it would seem that it could be as well inferred in such a case that the party in the house was guilty of negligence in causing its destruction in the absence of explanatory evidence showing the contrary, as it can be inferred from the mere fact that, if a horse is running away, the driver is guilty of negligence in causing his running in the absence of proof to the contrary. If such a doctrine should be established as the law, it is not easy to see to what extent it might be carried."

Creamer v. McIlvain, 89 Md. 343.

In this case the Court held:

> "The mere fact that horses ran away and an accident occurred will not justify an inference of negligence without some evidence of the circumstances under which it occurred."

Garlick v. Dorsey, 48 Ala. 220.

Here it was held that, to render defendant liable, it was necessary to show that he was negligent in permitting the horse to run away.

Shawhan v. Clark, 24 La. Ann. 390.

In this case it was held the owner of a runaway horse is not responsible for the injuries resulting from a collision with another horse and carriage,

no negligence on the part of the owner of the runaway horse being shown.

Cunningham v. Belknap, 60 S. W. 837 (Ky.).

In this case it was held:

> "Where plaintiff was run over by a horse and wagon driven by defendant's servant, and it appeared that the horse was running and could not be controlled by the driver, defendant was not liable in the absence of evidence showing that the conduct of the horse in running was due to any negligence on the part of the driver."

While it is true that there are decisions in different states that hold at variance with the law laid down in those above referred to, it is also true that such decisions are not in accord with the views of the Supreme Court of the State of California in the case of Rowe v. Such, 134 Cal. 573, above cited; and we take it therefore that the decision of the Supreme Court of the State of California, wherein the action at bar arose, will have greater weight with this Court than will the views of courts in other jurisdictions.

It is not alone, however, on the authorities above cited that we rely for a reversal of the judgment in this case, but it is also upon the general proposition of law that

> "where mischief is done or injuries inflicted by animals whose generic propensities or habits are neither mischievous nor dangerous, in order to charge the owner for damage done by such animals, it is necessary to allege or prove that such owner knew or had notice that the

animals were accustomed to such or similar mischief; or, to speak technically, the scienter must be alleged and proved. In such a case, actual negligence must be shown."

On this subject, see:

Thompson on Negligence, Vol. I, Sec. 853;

Shearman and Redfield on Negligence, Secs. 187 and 188.

Finney v. Curtis, 78 Cal. 498.

In this case it was held:

"The owner of an animal not naturally vicious is not liable for injury done thereby, unless it is affirmatively shown, not only that it was vicious, but that the owner had knowledge of the fact, or that he was so negligently handled by the owner as to cause the injury. When no negligence appears, the mere fact that a horse became unmanageable on the occasion of the injury does not prove that he was vicious or generally unsafe."

Clowdie v. Fresno etc., 118 Cal. 315.

In this case it was held:

"It is well settled in cases such as this that the owner of an animal not naturally vicious is not liable for an injury done by it, unless two propositions are established; one, that the animal in fact was vicious; and, two, that the owner knew it. (Finney v. Curtis, 78 Cal. 498.) Thus, if an animal theretofore of peaceable disposition, while in charge of a master or of a servant, suddenly and unexpectedly, either through fear or rage, inflicts injury, neither is responsible if at the time he was in the exercise of due care."

Haneman v. Western Meat Co., 8 Cal. Ap. 698.

In this case it was held:

> "The gist of an action against an owner of an alleged vicious horse, for injuries sustained by a kick therefrom, is the keeping of the vicious horse by the defendant with knowledge of its vicious propensities; and it is of the essence of the plaintiff's case that he should prove these matters, and also that he himself was ignorant of its viciousness until injury occurred therefrom."

To the same effect are the following:

Garlick v. Dorsey, 48 Ala. 220;
O'Brien v. Miller, 22 Atl. 544 (Conn.);
Swanson v. Miller, 130 Ill. Ap. 208;
Thornton v. Layle, 111 S. W. 279 (Ky.);
Bell v. Leslie, 24 Mo. Ap. 661;
Dix v. Somerset, 104 N. E. 433 (Mass.);
Benoit v. Troy, 48 N. E. 534 (N. Y.);
Hollybarton v. Burke, 26 S. E. 114 (N. C.);
Hamilton v. Hopkins, 93 Atl. 615 (Pa.);
Massio v. Williams, 167 S. W. 473 (Tenn.).

In view of the facts hereinbefore referred to and the authorities above cited, we respectfully submit that the United States District Court committed error in refusing to grant defendant's motion for a nonsuit, and that, for such error, the judgment made and entered in this case should be reversed, for, in refusing to grant said motion, it permitted the jury to surmise or conjecture, from the fact alone that said team ran

away while upon the premises of the defendant, that it must have run away because of some negligence or carelessness or unskillfulness or incompetency of the defendant or some one or more of defendant's agents, servants or employees, which inference, in the first place, said jury had no right to draw in the light of the authorities above referred to, and in the second place, should not have been permitted to draw under the decision of the Supreme Court of this State in Janin v. London & S. F. Bank, 92 Cal. 14, it being there held that:

> "In order to justify the submission of any question of fact to the jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged, and must be such that a rational, well constructed mind can reasonably draw from it the conclusion that the fact exists; and, when the evidence is not sufficient to justify such an inference, the Court may properly refuse to submit the question to the jury."

See also on this question the case of

Sullivan v. Morton, 13 Cal. Ap. 35,

which holds to the same effect.

It may be contended by the defendant in error, however, that the defendant in this action did have actual knowledge of the propensity of the team in question to run away, because of the fact that Mr. Thun testified that he told the defendant it was a free team in driving and he would not let everybody have it. But, in this connection, we call your Honors' attention to the testimony of Mr. Thun on

this question when he was under cross-examination. On page 42 of the Transcript, you will find the following:

> "Q. Did you tell them that it was a team that was wild and was liable to run away?
> "A. Not wild.
> "Q. I say, did you tell that to the man?
> "A. I said to be careful with them, because they had not been doing anything for three days."

This testimony we do not believe can, by any reasonable construction, be considered as giving notice to the defendant that such horses were wild or were liable to run away, or that there was any danger whatever of their attempting to run away while standing in the yard of the defendant back a distance of some twenty or thirty feet from the street, hitched to a delivery wagon of the defendant, after having been driven all day. That, under the circumstances proved, the information given to the defendant that the horses were a free team in driving was not sufficient to lead defendant to believe, or even to infer, that they were wild or would run away, is clearly shown by the following authorities:

Eastman v. Scott, 64 N. E. 968 (Mass.).

This was an action brought by the plaintiff against the defendant for injuries received by being kicked by a horse owned by the defendant which the defendant was driving. Verdict was directed for the defendant. Appeal was taken therefrom. On the appeal, the Court said:

"We think there was no sufficient evidence that, up to the time of the accident, the horse had a vicious habit of kicking or that the defendant knew or ought to have known that it had such a habit; there is nothing from which to infer that they knew more about the habits of horses than the ordinary man in whose business the use of horses is a mere incident; the animal had been in their possession but a month and a half and had, so far as appears, never given but a single kick, and that in its stable and under circumstances from which to say that the kick was vicious is merely conjecture. * * * Assuming that the fact of the single kick in the stable was known to the defendants, it was not enough to require the submission of the case to the jury, nor can it reasonably be inferred from the conduct of the horse at the time of the accident and on subsequent occasions that it had the vicious habit before the accident, nor that the defendants should be charged with knowledge at that time."

Benoit v. Troy, 48 N. E. 524 (N. Y.).

In this case it was held that

"In an action to recover damages for an injury done by a pair of runaway horses, proof that they had run away on another occasion ten days before, of which the owner had notice, is not sufficient to invoke the rule as to liability for harboring animals of known vicious propensities, when it is also shown that the horses had been driven for several years on street cars, appearing during that time kind and gentle, and that on both occasions of their running away they were frightened by boys hallooing and throwing snowballs; nor would such evidence justify the submission to a jury of the question whether the owner of the horses was negligent in continuing to use them."

Haneman v. Western Meat Co., 8 Cal. App. 698.

In this case it was held that,

> "Under evidence tending to show a previous kicking by a horse under special circumstances, without injury to anyone, but failing to show the general vicious nature of the horse, and utterly failing to show any knowledge by the owner of any acts of viciousness of the horse prior to plaintiff's injury, the verdict for the plaintiff is without support."

We again, therefore, respectfully submit that the United States District Court committed error in refusing to grant the motion of defendant for a nonsuit, greatly to the injury and damage of said defendant, and that because thereof the judgment made and entered in said Court should be reversed.

As to the Second Assignment of Error.

Refusal of Court to instruct jury to render a verdict against the plaintiff and in favor of defendant, on all the testimony (see page 123 of Transcript of record).

We have already referred, in discussing Assignment of Error No. 1, to the testimony introduced on the part of the plaintiff, and we now come to that introduced on the part of the defendant, to offset any possible conclusion of negligence on the part of the defendant or any of its agents, servants or employees, that could be drawn from the case made by the plaintiff.

In the first place, Frank B. Ench was called as a witness on the part of the defendant for the purpose of explaining a diagram of the premises of the defendant which had been prepared by him according to a scale, and which was introduced in evidence as Defendant's Exhibit A; and from his testimony it was shown that the premises of the defendant fronted on Broadway, 92 feet 8 inches, and had a depth of 97 feet 4½ inches; that, from Broadway, there were two driveways entering said premises, one about 35 feet southerly from the Twentieth Street side of the building, and extending clear back through the yard to the stable, and one nearer Nineteenth Street; that the place in the driveway nearest to Twentieth Street where the horses and wagon used by defendant were standing when they ran away was inside the yard of defendant and back a distance of about 24 feet 3 inches from the open doorway to said driveway shown on said diagram and on Plaintiff's Exhibits 2 and 3.

(See pages 62, 63 and 64 of Transcript of record.)

Mr. Thomas Walker was then called as a witness on behalf of the defendant and testified in substance as follows:

"I am bookkeeper for the Oakland Agency of the John Wieland Brewery, at its place of business on the west side of Broadway between Nineteenth and Twentieth Streets, and have been acting in that capacity for about six or seven years; I was acting in that capacity on

the 28th and 29th days of May, 1914, and was there on both of those days; I know Charles Thun and, in my capacity of bookkeeper of the defendant in this case, I had transactions with him regarding the hiring of a horse on the 28th day of May, 1914, the day prior to the accident to plaintiff; the day prior to the accident I rang Thun up and asked him about a team of horses, and he told me that he would let me have them for, I think it was, $2.25 for the day; I told him I wanted them the next morning; the only conversation that matured at that time with Thun was, he told me the horses were a light team, light weight, about 1100 lbs., and I said that would do; I said, 'All right, if that is the case, you bring them up tomorrow'. That is all the conversation that occurred between him and myself at that time; I am informed he brought the horses over the next morning, I was not there, and when the team came I had no conversation with him at all; I had never hired any horses from Thun before that time; the horses were used all day; they were brought there by Thun and driven by a driver by the name of Harry Crow; he was not a regular driver; they were brought back by Crow about half past four; shortly prior to the time he brought the team back I had a conversation with Thun over the phone, he asked me if we would use the team the next day, and I told him no; I said, 'Thun, you call at half past five and the team is yours, we will be through with the team and it is yours at half past five'. Crow was hired by the defendant to drive a bottled beer wagon to which Thun's horses were hitched. After he came back about four thirty, we did not require that wagon or those horses to be driven any further that day, nor did we have any further work at which to put Mr. Crow after he returned the horses and

wagon; his work for that day was done. I was in the office at the time that the horses ran away; the moment they started I could not see them; I have a window in the side of my office which showed me the horses going out of the driveway and I could observe them from my front window in the office; on the street I saw them running, I saw them from the time they were on the sidewalk from my front office window. I saw them from that time until they proceeded about a hundred feet on the side of the street when they passed out of my view. Then I went out of the office; the window at the side of my office is the one shown on Defendant's Exhibit A on the left side of the same place marked 'office'; the window in front of the office is the one shown on the Broadway side of the diagram.

"Q. By Mr. MILLER. Were you at any time in a position where you could see, and did you see, whether or not the wheels of the wagon were dragging?

"A. The wheels of the wagon were skidding.

"Q. They were skidding?

"A. . They were skidding, and then they would turn slightly and skid again, as far as I could see them.

"Q. When you say skidding, you mean not rolling, or what do you mean?

"The COURT. Skidding is sliding sideways.

"A. I don't mean that, your Honor, I mean they were just sliding forward and not running; they were turning a little and then not turning.

(Witness continuing.) "Mr. Thun rang me up about half past four and prior to the time that Crow came in with Thun's horses, and I told him that if he, Thun, would come around at half past five, his team would be ready for him; that would be half an hour after the team's work was done; I told him that because

> I did not want him to wait for his horses when he came there; I know the time that the drivers get back from their different routes, I can figure out pretty well by my length of service there just about what time a man will be back there; I figured it out that when Thun would come up there the team would be ready for him; I figured that Thun would get back about five and that the team would be ready for Thun about 5:30."
>
> (Pages 64, 65, 66, 67 and 68 of the Transcript.)

Alexander McKinnon was called as a witness on behalf of defendant and testified in substance that, for about two and a half years he had been in the employ of the defendant at its place of business in Oakland, on Broadway, between Nineteenth and Twentieth Streets, as a stableman and driving part of the time; that on the 29th day of May, 1914, in the morning, about seven o'clock, he was at its place of business and saw Charles Thun bring a team of horses there; that this team was hitched up to one of the brewer's wagons in the shed; that Mr. Thun drove the team up in front of the wagon and the horses were there hitched; that, when Mr. Thun drove the team in there, he said:

> "'Is this the place they want this team?', and I believe Mr. Cooper said 'Yes, we have been waiting for the team'. It was about half past seven then, and we had been waiting for the team since about seven o'clock. I was on the premises again in the afternoon when Mr. Thun came for the horses; at the time he came up, Mr. Cooper and I were doctoring a lame horse's foot in the front of the stable at the

back end of the building; I think Thun got around there about 5:30 o'clock; I did not hear him say anything because I was called into the office by Mr. Walker and, as I started to go into the office, I saw Thun and Mr. Crow sitting on the platform where they load the keg beer, that is the platform like at the entrance to the stable as shown on Defendant's Exhibit A; I went on into the office and, while Walker and I were talking, I heard someone holler 'Whoa', and then I heard the racket of the horses starting; I ran out of the front door and, by the time I got out the front door and was half way up, they were right across the street running across Broadway, they were going too fast for me to catch them; when I got down to the team on Twentieth and Broadway one of the horses was down. They were on the sidewalk by this time, one of the horses was down and the other was standing up; when I started to unhitch the team, one of the reins was tied to a rod around the seat where the check-back is."

(Pages 70, 71, 72 and 73 of the Transcript of record.)

On cross-examination, Mr. McKinnon testified in substance as follows:

"When horses are left there, there is not any custom about tying them or hitching them up, except setting the brake and checking them back; it is the custom always that the driver, when he stops his team sets the brake; you set these brakes by a ratchet proposition, you shove the brake on and shove it into a saw-tooth-like arrangement, and it holds there; the reins are customarily hooked up on the seat and they pull in back and check them back so that the horses are loose on the tugs; they are hitched back by a check-back ring on the line; on all of our own

horses we have a loop on the line that is buckled right on to the line with a ring in it and that is just the right length, so you do not have to stop and tie up the line, but back the team right up and hook the line on to the hitch-back that is located at the right length so that the lines themselves keep the horses loose in the traces; if there is not one of these hitch-backs we tie the reins into the hitch-back hook there. When I went to unhitch the team from the wagon after the accident I found one line tied around the seat; there is a rod runs around the back of the seat; that is the same rod they hook to if there is an arrangement on; the other line was dragging."

(Pages 76 and 77 of the Transcript of record.)

Mr. H. M. Cooper was then called as a witness on behalf of defendant and testified in substance as follows:

"I am, and on the 29th day of May, 1914, was, employed by the San Francisco Breweries, limited; I am a driver; at that time I had charge of the stable; on the morning of May 29th, 1914, I saw Mr. Thun; he brought the horses to the stable; he drove the horses in not hitched up to the rig, but he drove the horses in by the line; he came in by the back entrance; that is a different entrance from the one where the horses were fastened when they got away, that is, he came in by the entrance nearest Nineteenth Street; it was about 7:25 when he came in in the morning; we showed where the wagon was and he drove them up to the wagon and we put in the pole; he stayed in front of them while we started to hitch up; the wagon was in the driveway nearest Twentieth Street; I asked him about the team when he brought them in, if they were all right, because I seen a halter

on one of the horses and I asked him what the halter was on there for. He said one of the horses was a little bit skittish about the head but that he was all right. I told the driver not to take any chances with him but to put the chain on when he went out for anything. When Thun brought in the horses I helped hitch them up; Mr. Thun and Crow helped hitch them up; Mr. Thun was most of the time standing at their heads. About half past four Crow drove in from his route after his day's work was through; he came in the same way and drove around facing this way, that is, he came in from the entrance nearest to Nineteenth Street and drove around to the same dock or platform facing Broadway in the entrance nearest to Twentieth Street close to the office there; the team was tied up, that is, the reins were tied back and the brake was put on. I went into the office to see when Mr. Thun was coming after the team and they told me that he had telephoned that he would be up in a few minutes; he came there about half past five; I saw him when he came in; he came through the back entrance nearest Nineteenth Street and walked right back to the stable opposite to the entrance nearest Twentieth Street; he stayed there for a few minutes watching the treating of a horse, and then sat down on the platform where they load keg beer, that is, the dock right close to the door of the barn; he stayed there maybe five, six or seven minutes with Mr. Crow, and in the meantime I was attending to the horse that was being treated, and the team was standing over near the office hitched to the wagon; it was probably six or seven minutes when Mr. Thun said, 'I guess I'll unhitch and go home'; and Mr. Crow said, 'Well, to show you I am a good fellow, I'll help you unhitch.' Mr. Thun started out and Mr. Crow started to follow him, so the next thing I seen—I was standing holding this horse—and the next thing was

when I heard them holler 'Whoa', and I looked around and Mr. Crow was reaching for the line and Mr. Thun was standing on the left hand side; he stood next to the building, next to the bay horse. I saw the team after they were brought back from out on the road. The team was tied back, the reins were tied back to the seat and the brake was on; they were tied so that the traces were loose."

(Pages 78, 79, 80 and 81 of the Transcript of record.)

On cross-examination, Mr. Cooper testified in substance as follows:

"When I first noticed the team in motion, Mr. Crow was just stepping up grabbing, reaching for the line, stepping on to the step of the wagon; it was all done so quick, I do not know whether his feet were touching the step or not, but he did have it afterwards because he got the line and I seen him dragged on to the sidewalk; when he went out on the sidewalk he was on his back dragging.

"Q. By Mr. Moore. Now, let me see if we understand it correctly, and if we do not, we will correct it; when you had seen the wagon before the team started up, the reins were hitched back and tied in the back of the seat to the extent that the traces became loose; is that right? A. Yes, sir.

"Q. So that, if the team should then start up, they would be compelled to pull the weight of the wagon upon their bits; is that correct?

"A. Yes, sir.

"Q. And at that time the brake was locked; was it? A. Yes, sir, the brake was on.

"Q. When you saw them proceeding out of the barn door or the premises there, Mr. Crow was being dragged along the floor holding fast to one of these reins; was he?

"A. I told you at the first jump of the horses no, he was reaching for the line; the last time before he got to the edge of the sidewalk he was being dragged.

"Q. At the time that the rig passed out of the door, the brake was on; was it?

"A. It was.

"Q. Were the wheels locked?

"A. I was not looking at the wheels at that time.

"Q. Could you help seeing the wheels?

"A. Yes, sir, there are lots of times you don't see things like that, maybe you cannot see them; maybe you don't think about seeing them.

(Witness continuing.) "I could not say, when the team was going out of the door, whether the wheels were dragging or not; I did not notice that, but I noticed that Crow was being dragged; he was dragged right close to the wheels of the wagon as he held fast to one rein.

"Q. By the COURT. Did you notice whether the team was pulled around by the rein that he had hold of?

"A. In a way, yes, they were pulled a little; but he let loose when he got to the sidewalk.

(Witness continuing.) "He had hold of the right hand side of the wagon, the right hand rein, and that pulled the team around a little bit. Mr. Crow didn't have any more than room enough to get out of there, he just cleared it by the width of his body between the wheels and the edge of the doorway; at that time the team were not exactly headed down Broadway; the other line was pulling, I guess, a little bit harder; they got swung around on the side where Crow was dragging by his weight, they had been sort of turned by Crow dragging the right rein, and that pulled them off not exactly straight across the street; it was a little bit

south on Broadway, they were slanting a little down Broadway, that is, in the direction of Fourteenth Street, and when Mr. Crow let go, they turned on Broadway because the other line was pulling them around."

(Pages 81, 82, 83, 84 and 85 of the Transcript of record.)

"We had to release the brakes to pull the wagon away from the horses at the time to get them loose from the wagon when the horse was down. The team was not unhitched when Crow brought it in, because we were expecting Thun to come and get it. At that time of day you are speaking about, if they unhitched horses there was no room in the stable and there was no place to tie them up."

(Page 90 of the Transcript of record.)

Harry Crow was then called as a witness on behalf of defendant and testified in substance as follows:

"My name is Harry Crow, and at the present time I am driving a big automobile truck; on the 29th day of May, 1914, I was in the employ of the San Francisco Breweries as a driver of a bottling wagon and two horses; I remember the accident that occurred at the premises of the Brewery, on the west side of Broadway between Nineteenth and Twentieth Streets, about 5:30 o'clock in the afternoon of May 29th, 1914; I was working as an extra driver for the Brewery then and had worked, I think, about a week at that time, and then before that a few days at a time when they would call me. I continued in their employ for three or four days, I guess, after the accident; I drove the team that caused the accident. I was present at the Brewery on the morning of the 29th of May, 1914, when the team of horses which I drove on

that day were brought there by a man by the name of Thun; they were brought there by him, I think, about 7:15 or somewhere near that in the morning; they were driven into the Brewery premises by Thun, on the south driveway, and were harnessed when he brought them in; I asked him if the horses were wild, and he said, 'No, they are free drivers, one of them is a free driver.' I got back to the Brewery after the day's work about four o'clock in the afternoon; when I got back there there was no further route for me to drive over during the day; I drove into the place where we always unload our empties and unloaded all of the empties and went in to cash in with Mr. Walker. I went out and asked the stableman, 'Shall I unhitch them?' And he said, 'No, they have already telephoned us that the gentleman was coming after his team.' I put them at the platform where we always load up, at the same place that we drive them in, and left them standing there; that was the platform nearest Broadway.

"Q. By Mr. MILLER. Now, Mr. Crow, here is a diagram of the premises of the Brewery (pointing to Defendant's Exhibit A), the lower portion of which is Broadway; the line where my pointer is, is what they call the South Drive (pointing to the drive nearest to Nineteenth Street), and the other one (pointing to the one nearest Twentieth Street) is the North Drive; where I am pointing to now (pointing to the North Drive) is the platform nearest Broadway? A. Yes.

"Q. Then the one behind it, still farther back, near the stable, and still farther back of that the stable; now, point out on this map (referring to Defendant's Exhibit A) where it was you left the horses and wagon standing?

"A. Right here.

"Q. Now, then, you are pointing to the platform there on the north side of the North Drive

into the premises of the defendant and the one nearest Broadway? A. Yes.

(Witness continuing.) "When I stopped the wagon and the horses there, I put on the brake and tied the lines up; there were no rings on the lines; when I drove into the Brewery I set my brakes and there were no rings on the lines; there is a rail on the back of the seat; I just tied a loop right there with the lines like you would tie a bow knot and put the lines through and pulled them through like this (illustrating); the brakes were set, the lines were pulled back about the same as the rings would set them, pretty tight. I was on the premises when Mr. Thun came after his horses; I was sitting on the platform next to the ice-house over where they keep keg beer; it is just this side of the stable; the platform I refer to is the one on the diagram, Defendant's Exhibit A, shown as adjoining the stable; it is designated on the diagram as 'Loading Platform'. I was there alone until Mr. Thun came in ; he came up and sat down on the platform alongside of me. Cooper and McKinnon were working on a horse that had a nail in its foot, they were right in the doorway of the barn or stable. When Thun came up he said something about his team and Cooper said, 'They are waiting in the driveway,' or something to that effect. Thun and I talked possibly five minutes, and then he said, 'All right, I'll take my team.' I said, 'All right, I have been driving them all day and I'll come and help you unhitch them.' He started off ahead of me toward the team and I followed up behind him; he possibly was three paces ahead of me; he went on the left-hand side of the wagon and I went on the right-hand side, and he walked from this platform and I went on the right. There is no platform there, just a gangway there; and all at once the horses started to go and I made a jump on the step and grabbed for the lines and I caught one line

and they dragged me through the doorway; I suppose I went through a space of about two feet there and they dragged me on to the curb, and I had to let go; I had only one line; I could not tell where Thun was at that time; he was on the other side of the wagon and I could not tell. Just as I got to the step there was something started them; then I made a grab for the lines and jumped on the step to get hold of the lines; the brake was still on and the lines were still fast; I got only one line and hung on to the line to the curb about fifty feet; the horses were right at the curb, right on Broadway there when I dropped the line; the reason I dropped it was I could not hold on any longer, they were turning to the left and they would run over me and I had to let go of the line; they hurt me as it was."

(Pages 91, 92, 93 and 94 of the Transcript of record.)

"Cross-Examination.

"Q. By Mr. MOORE. Do you testify that this team started up before you reached up on the wagon at all?

"A. Just as we got about the front of the wagon something started them and I made a grab for the line.

(Witness continuing.) "They made a jump right there; I was not on the wagon when the horses started to run away; I was walking up to the step, I just got to the step; there is a step on the front of these bottling wagons on each side, and I had just got up to the front and was going to unhitch the traces on this side when the horses started, and of course I put my foot on the step and made a grab for the line on the right-hand side of the wagon; I was going to help unhitch."

(Pages 98 and 99 of the Transcript of record.)

"I tied these reins in there at the rim of the seat by means of a loop, I pulled them right around and pulled the loop into it; they were extraordinary long reins; they were hanging down, and I made a grab for them and caught the underneath part; they were long reins; they belonged to Thun, they came with the harness; they are not the Brewery harness; the part of them I caught must have been the part after the knot; I could not have pulled the line out if I didn't; the lines were two or three feet longer than our lines; the lines that extended back from the horses to the rail were not hanging slack; it was the end of the lines after the knot that was tied; I must have caught one of these ends; I could not tell how the line became untied."

(Bottom of page 103 and top of page 104 of Transcript of record.)

Defendant then offered, and there was received in evidence as a part of its case ordinance of the City of Oakland, Section No. 24 of Ordinance 607, New Series, reading as follows:

"No horse shall be left untied on any highway in the City of Oakland, unless securely hitched by a rope, strap or chain attached to its neck or bridle and to a post or other suitable fastening at the curb, or by a rope, strap or chain attached to its bridle and to a suitable weight of not less than twenty pounds; or, in case of one or two horses being hitched to a wagon fitted with a suitable brake, the horses may be backed, the brake set, and the lines or reins so fastened that the wagon cannot be drawn forward by the horse or horses, except by means of the lines or reins."

(Page 106 of the Transcript of record.)

In substance the foregoing is the testimony introduced on the part of the defendant, and we respectfully submit that it clearly shows, First, that, at the time the team in question ran away, they were not in the charge or under the management or control of the defendant or of any of its agents, servants or employees, but had been turned over to the owner, Mr. Thun; Second, that, whether said team was under the control of the defendant or not, it did not run away because of any carelessness or negligence or unskilfulness or incompetency of any kind or character on the part of the defendant or of any of its agents, servants or employees; and, Third, that, as a matter of fact, said team, at the time it ran away, was hitched, fastened or tied, although not standing upon a public street, but in the yard of the defendant a distance of some twenty or thirty feet from the public street, in strict accordance with the method provided by the ordinance aforesaid of the City of Oakland for the hitching, tying and fastening of horses standing upon the public streets of said city.

Notwithstanding these facts, however, the jury rendered a verdict against the defendant and in favor of the plaintiff for the sum of $8000.00 damages; and, as they could only do so by finding that the accident to the plaintiff occurred by and through the negligence or carelessness of the defendant, they must have found that, although the method of tying, fastening and hitching of said team adopted by the defendant would have been proper

and sufficient had said team been standing upon one of the public streets of the City of Oakland, such tying, fastening or hitching was not proper or sufficient when said team was standing in the yard or shed of the defendant at a distance of some twenty or thirty feet back from the street.

In other words, by the verdict of the jury it is in effect decided that the *greatest* care should have been used by the defendant where the necessity therefor was *least,* and that the *least* care should have been used by it where the necessity therefor was *greatest.*

Such a conclusion, we respectfully submit, is obviously absurd, and yet the Court, by its refusal to give to the jury the instruction requested, plainly left it to said jury to find as it did, thus committing error for which the judgment made and entered in said cause should be reversed. In this view we believe we are supported by the decisions in the cases of

Janin v. London etc., 92 Cal. 14;
Sullivan v. Morton, 13 Cal. Ap. 35,

which are hereinbefore referred to.

As to the Third Assignment or Error.

The giving by the Court of instruction as to fastening of team, etc. (see page 124 of Transcript of record).

The objection to this instruction is, First: That it leaves it to the jury to find on the evidence that defendant had control of the team of horses that

ran away at the time they ran away, while, as a matter of fact, for the reasons hereinbefore stated, the testimony clearly shows that it did not have control thereof; and, Second: It leaves it for the jury to say whether or not, at the time said team ran away, they were unfastened or unhitched, while the testimony is, without any contradiction whatever, that said team were fastened in strict accordance with an ordinance of the City of Oakland in that regard.

Under such circumstances, we respectfully submit that said instruction was erroneous, because it permitted the jury to find squarely against the facts proven at the trial, and that for the giving thereof said judgment should be reversed.

Compton etc. v. Dresbach, 78 Cal. 15;
Razzo v. Varni, 81 Cal. 289;
Janin v. London etc., 92 Cal. 14;
In re Calkins, 112 Cal. 306.

In each of which it is held that,—

In order to justify the submission of any question of fact to a jury, the proof must be more than mere conjecture or surmise that the facts are as alleged.

And, by the giving of the instruction here referred to, we respectfully suggest that the jury were permitted to surmise or conjecture that the defendant in this case was guilty of negligence solely and only because of the fact that the team in question ran away while it was standing in defendant's yard.

As to the Fourth Assignment of Error.

The refusal of the Court to give instruction as to Oakland ordinance (see pages 124-5 of Transcript of record.)

This instruction, we contend, should have been given to the jury, because it must be clear that, if the horses in question were hitched while in the yard of the defendant in the same manner they were required to be hitched by the ordinance hereinbefore referred to when upon a public street, the defendant surely could not be considered as guilty of any negligence in the manner of hitching. If it could, it would seem peculiar, to say the least, as by so holding the law would require the greatest care to be used where there was the least necessity for it, and the least care to be used where there was the greatest necessity for it. We believe such a contention to be so clearly untenable as to make it unnecessary to cite any authorities in opposition thereto; and we respectfully submit that the instruction refused should have been given, and that, in refusing to give the same, error was committed for which the judgment in this case should be reversed.

As to the Fifth Assignment of Error.

We contend that on all the facts as hereinbefore shown, and which were brought out on the trial of this case, and particularly for the reasons set forth and stated in the argument herein as to assignments of error numbers 1 and 2, that it was

error on the part of the Court to permit judgment to be entered in this cause on the verdict rendered by the jury, and that for such error the judgment should be reversed.

In conclusion, therefore, we respectfully submit, that in view of the facts as they are hereinbefore shown, and of the law as applicable thereto, the judgment rendered in this action in favor of the plaintiff in said cause, and against the defendant therein, should be reversed, and that judgment should be ordered to be entered in favor of the plaintiff in error for its costs and disbursements in said action, and on this writ of error.

Dated, San Francisco,
August 5, 1915.

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